

STATE OF MICHIGAN
COURT OF APPEALS

GUIDO CAPALDI,

Plaintiff-Appellant,

v

LIFTAID TRANSPORT, L.L.C.,¹ THE CLARK
GROUP, L.L.C., SPENCER CLARK, THOMAS
CLARK, and DAVID MARTIN,

Defendants-Appellees.

UNPUBLISHED

October 24, 2006

No. 267981

Oakland Circuit Court

LC No. 2005-063429-CK

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Plaintiff Guido Capaldi appeals as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Capaldi's complaint alleges that he was the majority owner of Lift-Aid, L.L.C., which produced and sold an overhead mechanized chair lift to assist disabled persons in their homes. Capaldi owned three patents pertaining to the device. In the spring of 2004, the business was having financial difficulties, and Capaldi decided to either sell the business or become an employee of the business, permitting him to receive a wage while still utilizing the resources of the business. Capaldi alleges that he received an offer from 4-D Pharmacy Management Systems, Inc., which he intended to accept, but then received a competing offer from defendant The Clark Group, through defendants Thomas Clark and David Martin. According to Capaldi, the latter defendants represented that The Clark Group "had an existing business plan and that [Capaldi] would be the president of an entity to be formed and known as (Defendant) [LAT], and that [Capaldi] would be in charge of and operate said company." Capaldi contends that it was represented that the plan included paying off certain of Capaldi's personal and company debts and providing him with other benefits to assist in paying off additional debts. Capaldi alleges

¹ The parties variably refer to this entity as "Lift Aid Transport," "Lift-Aid Transport," and "LiftAid Transport." We use the acronym "LAT" to refer to this party in this opinion.

that he relied on these representation and rejected the other offer. According to the complaint, Capaldi worked for LAT for seven weeks before he was constructively discharged.

Capaldi's complaint alleged five counts. Count I, fraud and misrepresentation, related to representations that were allegedly made to Capaldi to induce him to sign the employment agreement with defendants. Count II, breach of contract, alleged that Capaldi was entitled to certain compensation upon termination without cause and that LAT refused to pay that compensation. Count III, tortious interference with a contract, alleged that Spencer Clark interfered with Capaldi's contract with LAT. Count IV alleged that defendants violated MCL 600.2961 by not paying commissions for sales that Capaldi made during his employment with LAT. Count V challenged the enforceability of a covenant not to compete in the employment agreement.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court granted defendants' motion and dismissed all of Capaldi's claims pursuant to MCR 2.116(C)(10), explaining that Capaldi failed to cite authority or submit substantively admissible evidence to withstand summary disposition.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party must specifically identify the matters that it believes have no disputed factual issues, *id.*; MCR 2.116(G)(4), and has the initial burden of presenting affidavits, depositions, admissions, or other documentary evidence in support of the motion, *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). Once the moving party has met this burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Quinto, supra*, p 362. When the burden of proof at trial falls on the party opposing the motion, that party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts to show that there is a genuine issue for trial. *Id.*; *Maiden, supra*, p 121. Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden, supra*, p 118.

I. Fraud and Misrepresentation

Defendants argued that they were entitled to summary disposition pursuant to MCR 2.116(C)(10) because an integration clause in Capaldi's employment agreement voided and negated any alleged oral promises and representations. Defendants supported the motion with a copy of the employment agreement. In response, Capaldi asserted that if the contract was procured by fraud, it was voidable, and the integration clause was therefore immaterial.

On appeal, Capaldi argues that defendants failed to meet their initial burden because they only presented the employment agreement, which Capaldi had alleged was fraudulently induced. Capaldi also argues that summary disposition was inappropriate because discovery had not begun.

To prevail on his fraud and misrepresentation claims, Capaldi was required to show reliance on any misrepresentations, and a valid integration clause renders reliance on representations that are not included in the contract unreasonable. *UAW-GM Human Resource*

Ctr v KSL Recreation Corp, 228 Mich App 486, 504; 579 NW2d 411 (1998); *Hamade v Sunoco, Inc*, ___ Mich App ___, ___ NW2d ___ (Docket No. 265226, issued May 25, 2006), lv pending. Defendants met their initial burden of supporting their position that Capaldi's claims should be dismissed. Capaldi presented no evidence in response, no allegations, and no argument concerning the limited types of fraud that would vitiate the contract despite its integration clause. See *UAW-GM, supra*, pp 503-505. Therefore, the trial court properly dismissed this claim.

II. Breach of Contract

Capaldi's breach of contract claim was based on LAT's failure to pay compensation that was due under the contract in the event Capaldi's employment was terminated without just cause. We agree that the trial court improperly dismissed this claim under MCR 2.116(C)(10), when defendants' motion only sought dismissal under MCR 2.116(C)(8). Further, we are not persuaded by defendants' argument that summary disposition was appropriate pursuant to MCR 2.116(C)(8).

A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden, supra*, pp 119-120. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id.*

Defendants argue that dismissal of the breach of contract claim is appropriate under MCR 2.116(C)(8) because the complaint "fails to allege that [Capaldi's] employer deliberately created an intolerable working condition." "[C]onstructive discharge is a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily," *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994), and is established where "an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." *Id.* (internal quotation marks and citation omitted). Capaldi's complaint alleged that he was "constructively discharged" and "made to endure harsh treatment and unusual and intolerable conditions of employment." In ¶ 22(a)-(t) of the complaint, Capaldi set forth detailed descriptions of the alleged unusual and intolerable employment conditions. Those allegations, accepted as true, were sufficient to allege a breach of contract claim premised on a constructive discharge. Capaldi's claim was not "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden, supra*, pp 119-120.

Consequently, we reverse the trial court's grant of summary disposition on this claim pursuant to MCR 2.116(C)(8).

III. Tortious Interference With a Contract

Capaldi alleged that Spencer Clark knew about Capaldi's employment contract with LAT and "intentionally interfered" with it "by contriving to threaten [Capaldi] with bodily harm and holding [Capaldi] up for ridicule and censure by [Capaldi's] superiors, all in furtherance of Defendant Spencer Clark's personal interests and his personal relationship with employee Christine Herb." Capaldi further alleged that Spencer Clark's conduct was wrongful per se as either an assault or conduct done with malice and without justification. Defendants' motion

sought dismissal of this claim under MCR 2.116(C)(8). Again, we agree that the trial court improperly dismissed this claim under MCR 2.116(C)(10), when defendants' motion only sought dismissal under MCR 2.116(C)(8).

Further, we are not persuaded that summary disposition was appropriate under MCR 2.116(C)(8). Defendants argued that Capaldi failed to state a claim because he did not allege that Spencer Clark's intent was to interfere with the employment contract. Because Capaldi was relying in part on an alternative theory that Spencer Clark's conduct was wrongful per se, Capaldi's complaint sufficiently alleged with specificity affirmative acts that would corroborate the improper motive of interference. See *Badiee v Brighton Area Schools*, 265 Mich App 343, 365-367; 695 NW2d 521 (2005). Thus, we reverse the trial court dismissal of this claim.

IV. Commissions

Capaldi's complaint alleged that he made "at least four sales" for which he was due a commission and that LAT failed to pay the commission for more than 45 days, contrary to MCL 600.2961. Defendants' motion asserted that this claim should be dismissed because they were tendering payment of \$2,400 to the court, which represented \$200 for each of four sales and an additional \$1,600 for treble damages. In response, Capaldi argued that defendants had not presented any evidence showing that \$2,400 was the correct amount, that discovery was necessary to determine the actual number of units sold, and that Capaldi was additionally entitled to attorney fees under the statute. Capaldi reiterates these arguments on appeal and further asserts that dismissal of this claim was improper in light of defendants' admission that he was owed money.

We agree that the trial court's dismissal of this claim was improper. The complaint alleged that Capaldi made "at least four sales" for which commissions were due. Defendants did not present any evidence to corroborate their assertion that only four sales were made. Moreover, even if the amount of the commissions owed was properly established, MCL 600.2961(6) entitles a prevailing party to reasonable attorney fees and costs. Defendants failed to demonstrate that they were entitled to summary disposition on this claim. We therefore reverse the trial court's dismissal of this claim.

V. Declaratory Relief - Covenant not to Compete

Capaldi challenged the enforceability of a restrictive covenant in his "Confidentiality and Non-Competition Agreement" and claimed that it violated MCL 445.774a(1). Capaldi alleged that the covenant was unreasonable because he was fraudulently induced to sign it, that LAT terminated his employment without just cause, that the duration of the restrictive covenant (24 months) was unreasonably long, and that the scope of the restrictive covenant (global) was unreasonably excessive. In addition, Capaldi alleged that the agreement was unenforceable because it did not meet the essential requirements for formation of a contract..

Defendants argued that dismissal of this claim was warranted because Capaldi's assertions of fraud, misrepresentation, and constructive discharge were defective, and the only issues with regard to this covenant concerned whether it was unreasonable in duration and scope.

MCL 445.774a(1) states:

An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent that any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

Although restraints on trade are generally unlawful, the enforceability of non-competition agreements depends on reasonableness. *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478, 485-497; 650 NW2d 670 (2002).

Because the prohibition on all competition is in restraint of trade, an employer's business interest justifying a restrictive covenant must be greater than merely preventing competition. To be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill. [*St Clair Medical, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006).]

A restriction that is not limited in its geographic scope is not necessarily unreasonable. For example, where a business operated in 43 states and "a number of foreign nations," a six-month restriction on employment with any healthcare information systems consulting business without any specified geographic limitation was deemed reasonable. See *Superior Consulting Co, Inc v Walling*, 851 F Supp 839, 847 (ED Mich, 1994). However, the court in *Superior Consulting Co* noted that "[g]eographic limitations in non-competition agreements must be tailored so that the scope of the agreement is no greater than is reasonably necessary to protect the employer's legitimate business interests."

An assessment of reasonableness in light of the employer's legitimate business interests under MCL 445.774a(1) is inherently fact specific. Here, defendants failed to satisfy their initial burden of presenting affidavits, depositions, admissions, or other documentary evidence in support of the motion. *Quinto, supra*, p 362; MCR 2.116(G)(5). The only evidence defendants presented that is relevant to the assertion that the limitation was reasonable was the agreement itself, which states in part:

Mr. Capaldi acknowledges that the market for the Company products and services are worldwide. Thus, the terms of this Agreement are reasonable and necessary even though they prohibit Mr. Capaldi's competition throughout the world

An acknowledgement that the *market* for a product is worldwide does not establish that LAT was *operating* on a worldwide basis, as in *Superior Consulting Co, supra*. Nor did the agreement establish that protection of LAT's legitimate business interests from Capaldi gaining an unfair advantage in competition required the comprehensive prohibition, extending worldwide. The restrictions in the agreement include that Capaldi shall not

be a partner, member, employee, advisor or agent of any partnership or joint venture, or a trustee, officer, director, shareholder, employee, advisor or agent of any corporation, trust or other business organization or entity, or own, manage, join, participate in, encourage, support, be engaged in, have an interest in, give financial assistance or advice to, permit his name to be used in connection with or be concerned in any way with the ownership, management, operation or control of, or be connected in any way with any business which competes, directly or indirectly, against Company in developing, designing, manufacturing, marketing, selling, licensing, sublicensing, or distributing the same, or similar, lines of products (including potential products) or services as Company.

Defendants did not present any evidence to support their position that the company's legitimate business interests necessitated this far-reaching restriction. They did not show that there was no genuine issue of material fact that it was aimed at protecting the company from Capaldi gaining an unfair advantage in competition, rather than simply preventing competition. See *St Clair Medical, PC, supra*, p 266. Therefore, defendants did not establish that dismissal of this claim was warranted. Accordingly, we also reverse the trial court's dismissal of this claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder